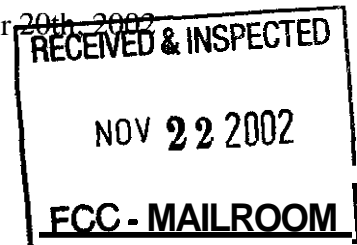


MATHEMÆSTHETICS, INC.

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DOCKET FILE COPY ORIGINAL

November 20th, 2002



Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: **NOTICE OF PROPOSED RULE MAKING (NPRM) IN THE MATTER OF THE
TELEPHONE CONSUMER PROTECTION ACT (TCPA)**

DOCKET #02-278

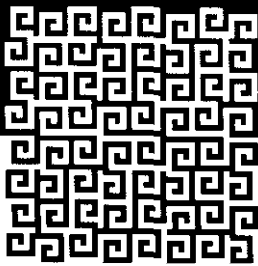
To whom it may concern:

Enclosed please find one original (unstapled) and nine copies (stapled) of my comments with regard to the above matter. Please ensure these comments are included for the Commissioners to see.

Thank you.

Douglas M. McKenna, Pres

No. of Copies rec'd 0 + 9
List ABOVE



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NOV 22 2002

FCC - MAILROOM

Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: **NOTICE OF PROPOSED RULE MAKING (NPRM) IN THE MATTER OF THE
TELEPHONE CONSUMER PROTECTION ACT (TCPA)**

DOCKET #02-278

Comments Submitted by Douglas M. McKenna

To the Commission and the Commissioners:

I am the owner of a small software business. I have both college and graduate degrees from Yale University in computer-related areas. My telephone-company-funded engineering Masters degree work involved the statistical study of various automated switching methods used to route telephone calls within the phone network in order to maximize the chances of a successful connection. Although my company is a marketer of its own products, I currently have no affiliation with any telemarketing or telephone company, nor does my business conduct any telephone-company-related work. I am commenting here primarily in my capacity as a small business telephone subscriber, but also as an individual residential telephone subscriber.

As one of the few businessmen in the State of Colorado who has prosecuted legal actions under the TCPA, I have reached the conclusion that – to put it bluntly – this 10 year old statute and its regulations have largely been a failure. Not a complete failure, but the evils the TCPA attempts to govern certainly haven't abated. In fact, in my experience and the experiences of nearly everyone I've talked to, telemarketing abuses have become markedly worse. The reasons for these failures are, in my opinion, multivaried and complex, and some of them have to do with the Commission's rules and regulations, so I am heartened by this opportunity to comment on possible revisions to them. I also urge herein the Commission to return to Congress with recommendations for certain statutory changes out of reach of the Commission's rulemaking authority.

Like most businesses, mine is utterly dependent on the telephone network and related technologies to accomplish timely communication with my customers. This dependence is espe-

cially crucial for minimally small businesses such as mine, where there is only one employee and thus no redundancy in operations. I cannot be physically present in my office at every moment of the day (and often night) to receive customer communications. I thus depend on various automated store-and-forward technologies to accept messages on my behalf as they arrive, by recording those messages using *my privately owned equipment and media* for my later perusal and response.

The automated telephone-based technologies my business relies upon consist of (1) digital electronic mail (“email”) via the internet over a telephone line, (2) an answering machine on my normal voice telephone line, and (3) a facsimile machine for receiving copies of customer purchase orders. These few telephone lines deliver at least 95% of the orders for my company’s products (the tiny remainder arrives via another store-and-forward communications medium known as the U.S. Post Office box, which I rent from the government rather than own).

In addition, my company accepts credit card account numbers for payment via email, phone, and fax. The eventual electronic transactions (funds transfers) are accomplished over one of these same telephone lines as well. In fact, my company can even *ship* its software products to customers just about anywhere in the world over its telephone lines to connect to the internet. In short, my entire ability as a successful software entrepreneur to conduct intrastate, interstate, and international commerce (I have customers in 25 countries around the world) depends on just a few pairs of telephone wire into my office.

The continued and increasing automated abuse of these telephone-based store-and-forward mechanisms – particularly computerized access to the phone network for the purposes of “broadcasting” commercial solicitations – harms my business in several ways. Not only are my limited raw resources (computer memory, answering machine memory, or fax paper) consumed or destroyed, but the company goodwill that I have worked hard to build with my customers is threatened by virtue of the interference in my business operations that junk faxes, prerecorded phone messages, and “spam” (unsolicited commercial email) cause. There is no worse feeling than having a customer complain about my losing a legitimately faxed purchase order that (I found out later) had been buried in a heap of unwanted junk faxes that had arrived the same day. Similarly, I am now getting so much email spam that legitimate communications are regularly being lost as well.

Junk Faxes

In spite of the TCPA’s decade-old complete ban on unsolicited fax ads (the TCPA’s most stringent and least ambiguous prohibition), the transmission of unsolicited advertisements to fax machines across the country is for all intents and purposes completely out of control. These junk faxes are a scourge of the business community, and certainly affect residential fax machine owners also, often waking folks up in the middle of the night. In my local Denver metropolitan area alone, I am aware of about five million documented junk fax transmissions in one nine-month period during 2001, transmitted by just a single, now-defunct company. Each of those faxes also violated state law as well as the TCPA. In the last four years, I would estimate the actual number of unlawfully transmitted junk faxes in just my area at four to eight times that amount.

In my own case, my company's single fax machine has to date received about 900 of them, representing an estimated 1500 separate violations of the TCPA and its regulations, as well as state law. Every fax machine owner I have talked to complains of the same problem. In fact, many local business fax machine owners have told me they have been receiving far more junk faxes than my business has. There are at least 200,000 fax machines in the greater Denver area, if one is to believe a particular fax broadcaster's marketing. Thus, there is every reason to believe the number of junk faxes transmitted just to fax machines in the area code 303 in the last four years is on the order of hundreds of millions. That's a lot of violations of law.

Two years ago, I installed a personal fax machine on a residential telephone line that had never in the previous decade had a fax machine attached to it. It took less than one month before "war-dialing" equipment, operated by or on behalf of a fax broadcaster, discovered the fax machine at that number, whereupon that nearly always unattended machine began receiving unsolicited advertisements until it ran out of paper, which of course rendered my machine useless. Of course, I had never given permission of any kind whatsoever to anyone to transmit those materials. I know of no fax machine owner who has.

Several weeks ago, my company received a junk fax the origin of which I was able to track down. A woman in Nebraska, the secretary of her church, had set up her personal computer and two telephone lines to transmit unsolicited fax advertisements (solicitations for a multi-level marketing scheme). She explained to me that she is sending out about 500 per day. In theory, I could hold her accountable for her actions under the TCPA, but like so many violators, she operates from a different state, and therefore I cannot use small claims court, as the TCPA contemplates, to complain against her.

With respect to junk faxes arriving from within my own state, I now have several years experience litigating my rights under 47 U.S.C. 227(b) as *apro se* plaintiff. In spite of the fact that, so far, I have yet to lose a case, the entire effort has been a complete loss that I would not wish on anybody. The amount of time, energy, and productivity that I've put into asserting my federal right to be free of unsolicited fax ads (and I am told I have done an outstanding job) has so far added up to an order of magnitude greater than the actual minimal monetary damages awards that the TCPA provides for in "compensation." One small claims case, in which a fax broadcasting service provided my defendant (their client) with a defense attorney well-versed in the art of legal deception, took 16 months to prosecute and win, during which I had to appeal an adverse ruling from small claims to district court in order to have the small claims court reversed on the most elementary constitutional grounds. Regardless of these wins, I cannot spend \$10,000 of my time to win a \$500 damages award very often.

There is no doubt in my mind why the TCPA is rarely enforced – it is simply an economically irrational decision for anyone, especially a small business owner, to attempt to do so (and of course, junk faxes are easy compared to voice telemarketing violations). When I first approached an attorney about filing a TCPA complaint over junk faxes, I was advised to skip it because the cost of using an attorney would far outweigh even the greatest recoverable damages. He was right, but I've found that the cost of not using an attorney outweighs the benefits just as much. Time is money. The idea that a junk fax recipient can just go to their small claims court and recover federally mandated damages, much less exemplary damages to help stop the problem, is

just this side of myth for the average recipient. Unfortunately, fax broadcasting businesses understand this situation all too well, and they flout the law with the same impunity that many other forms of organized crime do.

One of the most blatant errors the Commission has made, which error is exacerbating the problem of junk faxes and the difficulty of asserting one's right to be free of these forms of marketing vandalism, is in the FCC's assertion that a facsimile advertisement is not unsolicited if an established business relationship exists between the sender and the recipient. There is no basis in the TCPA's statutory language for this FCC-created exception. Such an exception does exist in the TCPA for voice telemarketing calls. However, Congress conspicuously and deliberately left the so-called "EBR" exception out of the ban on unsolicited fax advertisements. This is wholly reasonable in that under the TCPA only express permission suffices to allow a faxed ad. An EBR exception is only implicit permission, and doesn't cut it.

By way of analogy, if I buy a ten cent washer from my local hardware store, thereby creating an EBR, that EBR does not and cannot be a basis for that business erecting a billboard on my property in the middle of the night without my express permission (I exaggerate, but the analogy to a junk fax is only different in scale, not in kind). An EBR does not give any business the right to trespass, use, and consume my property to market itself to its benefit at my expense, solely because it assumes my property has little worth. The principle is the same one that every parent teaches their children: you wanna use somebody's stuff, you gotta ask first, no matter what the relationship, no matter what the stuff, no matter what the cost. Unfortunately, a great many adults don't seem to recall this lesson, especially when it comes to shifting their marketing expenses off onto unwilling fax machine owners. Junk fax advertisers shift the costs of their marketing in the same way that car thieves shift the costs of their driving.

I am aware of several courts that have refuted the FCC's incorrect EBR exception to the TCPA's total ban on junk faxes. I myself have had to argue the issue recently in my district court, which fortunately and properly didn't agree with my defendant's contention that we had an existing business relationship. But junk faxing defendants have seized on the FCC's incorrect exception, and it is causing a tremendous amount of wasted judicial time.

Many junk faxers buy databases of fax numbers from third parties, often touted via spam on the internet. These databases are falsely marketed as "opt-in" databases. I was recently junk faxed by a local marketing company that bought such a CD in which my company phone number appeared. Of course, my company and I personally have never given permission to anyone to fax ads to our machines, nor given permission to anyone to sell our fax telephone numbers in a database, which is itself a violation of my state law. The representation of the database as being only "opted-in" subscribers is a scam perpetrated upon the fax advertiser doing their own faxing. The advertiser is of course ultimately liable; regardless, fax recipients are ultimately the ones paying the price.

In order to protect fax machine owners from the foregoing shenanigans, the Commission should adopt a rule that requires any person or entity (advertiser) that transmits advertising by facsimile to maintain a record of the prior express permission (name, date, phone number, method of opting-in) the sender has acquired. The rule should be unambiguously prescribed pursuant to sub-

section 47 USC 227(b), so that violation of the rule can be privately actionable. In addition, the rule should make it clear that it is the advertiser who must maintain the records of permission, regardless of whether the fax broadcaster does or not. If the fax broadcaster participates in the content of the transmission in any way, then the fax broadcaster must additionally maintain those permissional records. If the TCPA can require voice telemarketers to maintain an opt-out Do-Not-Call request for 10 years, it is not unreasonable for fax advertisers to be required to maintain their opt-in permissional records for the same amount of time. Such a rule would go a long way towards solving the junk fax problem, as long as it is clear that violations of the rule constitute further violations of § 227(b) and are thus privately actionable.

The Commission needs to make it absolutely clear in its rules (so far, it has only said so in a citation against one particular junk faxer, 21st Century Faxes) that there is no first chance for the transmission of a fax ad, and that no recipient has any obligation to request a junk fax transmitter to stop, for the simple reason that each and every junk fax is a self-contained independent violation (or violations) of law.

A great many of the junk faxes I or my company receive have no caller ID associated with the call. I urge the Commission to require all facsimile advertisers or fax broadcasting services to include accurate caller ID information, and to make sure that any such rule is unambiguously made pursuant to § 227(b), so that violations are privately actionable.

An additional related issue is that a great many junk faxes my business receives are deliberately anonymous (only a phone number, no printed business name, much less caller ID), and a great many have improper or unclear identification. Lack of identification and time and date makes it difficult to pin down responsibility for damages that might arise, especially if I am out of the office and cannot myself record some of the pertinent information when it is missing. Those few recipients who have attempted to enforce the TCPA really need the FCC to disambiguate (a fancy word for clarify) whether or not so-called "header" violations are or are not privately actionable as a regulation prescribed under § 227(b). I have recently successfully argued in court that they are privately actionable on the basis of there being no explicit FCC statement to the contrary, that all remedial consumer protection statutes must be interpreted liberally, and that the lack of proper identification (as required by 47 CFR 68.318(d)) constitutes a real harm.

The FCC has stated that rules and regulations in 47 CFR 64.1200 are prescribed from both § 227(b) and § 227(d). In the interests of judicial economy and of empowering TCPA plaintiffs with tools to fight against the scourge of junk faxes, it is time for the FCC to do the same for 47 CFR 68.318(d). Please make it unambiguously clear that violations of 47 CFR § 68.318(d) are privately actionable under § 227(b). Alternatively, issue a new rule concerning identification requirements on faxes, and ensure that that new rule is expressly promulgated pursuant to § 227(b).

Finally, I urge the FCC to go back to Congress to explain the failure of the junk fax provisions in the TCPA with respect to individuals being the primary enforcers of the law. The fax broadcasting industry has had 10 years to comply with the law, and they have flouted it almost completely, often under the direction of incompetent attorneys who ignore basic constitutional issues in order to provide ultimately losing arguments to the fax blasters, whose pockets are

deeper than the average recipient's.

Congress needs to face the problem of the expense of achieving justice under the TCPA, even using small claims court, and to raise the compensatory damages for violations. To that end, the FCC should request that Congress amend the TCPA's provisions governing junk faxes in the following ways:

- 1) Provide for plaintiff's to be able to recover attorney's fees from defendants; or
- 2) Double/triple the minimum compensatory damages to \$1000/\$1500 per violation; or
- 3) Tie extra damages to subsequent junk faxes from the same sender, so that, for example, any given junk fax should be awarded the damages awardable for the previous junk fax in the series from that sender, plus \$500. Make it far more onerous to repeatedly broadcast advertisements to fax machines. It should not be cheaper to violate the law and pay the penalties than to comply with the law, and there should be extra penalties for anyone whose repeated broadcasts represent a fundamental abuse of automated machinery against which people and businesses of modest means cannot protect themselves. Such a ratcheting provision for damages would go a long way towards solving the problem of junk faxes, whose senders cause untold millions of dollars worth of damages to the business, especially the small business, community.

Voice Telemarketing

Voice telemarketing is also a scourge that invades the privacy of our homes, and which interrupts and interferes with business operations, especially small business operations such as mine. As I sit in my office trying to do my job (I'm a one-person company, with no costly receptionist to field calls), I must continually answer the phone all day only to find that yet another phone company or credit card company is calling for the 10th time. I've asked them not to call again, but of course the law doesn't require them to stop, so they ignore my requests and continue the harassment. These calls interfere with my ability not only to do my own work, but my ability to communicate with my customers, transact business, etc.

I urge the commission to allow businesses to place their telephone numbers on any national Do-Not-Call list. I have a right as a business owner to keep the vast multitude of strangers interesting in saving time and money from doing so at my expense. Anyone I want to contact for business purposes I will call on my own schedule, thank you very much.

I often answer the phone only to find a complete silence on the other end. This is an infuriating experience. Telemarketers are foisting their time costs off onto unwilling recipients, all in the name of their business efficiency. But where are the costs of my being interrupted many times during the day, attempting to do my job, included in all those calculations? I consider it an egregious abuse of technology. At the very least, it is utterly rude behavior that no one should have to put up with.

Predictive dialers are worse, in that they hang up on you once you answer, because the telemarketer has called many more numbers simultaneously than there are available sales representatives. These calls have no identification of the caller in them, and are prima facie violations of the TCPA voice identification requirements for telemarketing calls. I urge the Commission to ban predictive dialers completely (alternatively, to set the legal abandonment rate to 0%). These

machines enable and achieve a behavior that is no different from common telephone stalking.

There should be no first chance for a telemarketer's call in violation of a national DNC list.

The Commission should make it clear that under the TCPA, any state law with more restrictive provisions regarding DNC lists are not threatened by any Commission rule that is less restrictive than a particular state law. A great many comments to the Commission, particularly from Indiana, seem to be based on the misunderstanding that the TCPA will preempt state laws. But only less-restrictive state laws will be preempted, and the Commission needs to point this out in any rulemaking. I've argued the federal preemption of state law issue with respect to the TCPA in my local courts, and the court has completely agreed with me that only less-restrictive state laws are preempted under federal law or regulations. This is basic Constitutional Law 101 (*c.f.* the Supremacy Clause of the Constitution of the United States).

As a small business owner with complete knowledge of everything that goes on in my business, it is quite easy to determine in some cases when a telemarketer is engaged in a scam that is based on the assumption that in a larger organization no one knows what's going on. For instance, one common telemarketing scam that I am regularly subjected to is for an unidentified telemarketer to call and ask for information about the copying machine someone has allegedly asked to repair. But I've had no repairs done on the machine. In a larger organization, the receptionist is likely to assume it's legitimate, and fall for the scam, which is to sell some kind of expensive supplies. Of course, there is no caller ID with which to track down who's responsible.

I urge the Commission to adopt rules whereby telemarketers are required to provide accurate caller ID information in every call.

I urge the commission to prohibit leaving an unsolicited advertisement, whether prerecorded or not, on any voice-mail or answering machine. There is a commercial free speech right to voice telemarket (at least up until a DNC request), but only when the cost of that speech is born by the speaker. There is no commercial free speech right to use up the limited storage capacity of an answering machine to store that advertisement on equipment that doesn't belong to the speaker. This is precisely analogous to the junk fax situation. As the Supreme Court has decided, a person's free speech rights end at another's property line.

I urge the Commission to make prerecorded calls to businesses actionable. I just received one while writing these comments. If every business abuses the telephone network this way, the telephones of the businesses they are calling, which people have to answer, are doomed.

Finally, as a computer programmer with over 30 years experience, I urge the commission to ignore any entreaties on the part of the telemarketing industry whereby they complain of the costs of maintaining or participating in a national Do-Not-Call list. There are only 10 billion possible 10-digit telephone numbers in North America, assuming all 1000 potential 3-digit area codes were used. But one does not need to store these phone numbers in a database, one need only use that number as the index into a file containing a byte code for the DNC expiration date for that number. In fact, the entire national DNC database could be kept in a single 10 GB data file on a hard disk that would fit in the palm of one's hand, costing less than \$500, accessible using a \$2000

personal computer. Each month, the entire file could be updated in matter of minutes to compute which DNC requests have expired, thereby freeing up those numbers to the telemarketers. The software for checking a given telemarketer's list of numbers against the national list would be trivial to write for anyone with minimal training in computer science. So would the software for adding DNC requests to the file, whose size would never change under this scheme, making its file access and maintenance extremely efficient.

With redundancy and backups, and connectivity to the internet, the costs of implementing a DNC list ought to be absolutely minimal once a few salaries and ISP fees and other expenses (rent) are included. The entire process of vetting a telemarketer's list of telephone numbers should be completely automatable, as easy for a telemarketer as sending an email and receiving a vetted list back within a few minutes. The cost should be born by the telemarketers, metered according the size of number lists each telemarketer is asking to vet.

Spam

The TCPA does not address unsolicited commercial electronic mail ("spam"). It should. There are no basic differences between unsolicited ads on my fax machine, unsolicited ads on my answering machine, and unsolicited ads imported into the email database on my computer's hard disk.

The fundamental issue with faxes, answering machines, and email disk space, all of which are forms of store-and-forward messaging, is that complete strangers are using my resources to store their marketing, and the telephone network makes it almost costless for them to send messages to their benefit but at others' cost to anyone attached to the network. This is a violation no different from someone borrowing for a few minutes my car parked unlocked with the keys in it in a mall parking lot, on the basis that there would no cost to me for some stranger to do so. Why should it be any different from my store-and-forward messaging telephone and computer equipment "parked unlocked" on a publicly accessible network. Because everyone belongs to the open telephone network, which supports different protocols for transmitting information (facsimile/voice, digital), it is incumbent upon everyone to act responsibly and with due regard to the rights of others. This means asking permission prior to consuming someone's property, even temporarily.

Like everyone else I know, I am being deluged with spam, to the point that electronic mail is becoming useless as a communications medium. Telephone network promulgated spam (a great deal of the internet operates over the telephone network) is harming my business, and making it more and more difficult for me to communicate with my customers. Unregulated spam is directly threatening one of the greatest technological communication inventions of the 20th century, digital electronic messaging.

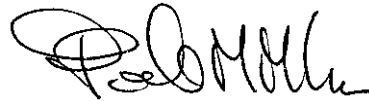
I urge the Commission to go back to Congress to ask Congress to reconfigure the TCPA to include unsolicited electronic mail (spam) in the list of activities that the law should proscribe. All the usual identification arguments apply, as do the arguments about private enforcement being useless without either attorney's fees provided for, or for significantly higher penalties. Like much of junk faxing, it appears that spam is being promulgated by mostly scam artists and third-

rate marketers, whose irresponsible and unregulated selfish behavior is causing harm to rest of us. I urge the Commission to do everything possible to achieve the return of civil behavior to those who otherwise abuse the open nature of the national telephone network.

I wish to live in a society where I am not burdened by the misuse and abuse of automated machinery, where my fundamental rights are not violated on the basis of the "efficient" transmission of unsolicited solicitations. It is a classic tragedy of the commons situation, whereby certain people defect against the common shared good in favor of their own greedy interests, and as such is something that only government can address. The TCPA is an excellent start, but it is self-evidently not working.

Thank you for reading and hopefully acting upon my plaintive pleas.

Sincerely,

A handwritten signature in black ink, appearing to read 'Douglas M. McKenna', written in a cursive style.

Douglas M. McKenna, President
Mathemaesthetics, Inc.

cc: Representative Mark Udall
2nd Congressional District, Colorado

cc: Senator Wayne Allard, State of Colorado